

- (1) What is the nature and extent of claimant's injury and disability?

- (2) Is respondent entitled to credit for an overpayment of temporary total disability compensation?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

This matter is a companion case to Fehr v. Farmers Cooperative Union and Farmland Mutual Insurance, Docket No. 179,584. The Administrative Law Judge in that case assessed claimant a ten percent (10%) whole body functional impairment. That case was not appealed to the Appeals Board.

In Docket No. 179,585, the matter currently before the Appeals Board, claimant fell off of a railroad car on November 4, 1991, suffering additional injuries. Claimant has alleged the additional injuries encompassed not only his foot and ankle for which treatment was provided, but also includes additional injury to his back.

Administrative Law Judge Robertson, in his Award, discussed at length the medical testimony of Dr. Milo G. Sloo the treating physician. Judge Robertson stated that Dr. Sloo found the injuries of November 4, 1991, were whole body injuries and not scheduled as alleged by the respondent. A review of the deposition of Dr. Sloo does not bear out the findings of Judge Robertson. Dr. Sloo, in discussing the injuries of November 4, 1991, found claimant to have suffered a twenty percent (20%) functional impairment to the foot and ankle. He also stated claimant had suffered bruising to the right hand and elbow as a result of the fall, which injuries resolved, with no permanency. He gave no functional impairment rating to claimant's thumb, elbow or shoulder. In combining the ratings of the back and the ankle, Dr. Sloo made it clear he was not using the combined values chart, but was instead adding the ten percent (10%) to the back with the ten percent (10%) to the lower extremity for claimant's functional impairment. He did this because he found the injury to the back on July 16, 1991 and the injury to the foot and ankle on November 4, 1991 to be two distinct injuries and not combinable. Dr. Sloo went on to state that he felt the two separate injuries were "two distinct things" and for this reason he added the impairments rather than use the combined values chart.

The testimony of Dr. Sloo indicates claimant suffered no additional injury to his back from the November 4, 1991 fall. Instead, Dr. Sloo indicated the injury in November was limited to the claimant's foot and ankle. In dealing with injuries to the extremities which do not involve the body as a whole, claimant's entitlement to compensation is controlled by K.S.A. 44-510d(a).

K.S.A. 44-501 and K.S.A. 44-508(g) make it the claimant's burden to prove by a preponderance of the credible evidence his entitlement to all of the benefits listed. This burden must be carried by a preponderance of the credible evidence.

The Appeals Board, in reviewing the testimony of Dr. Sloo, finds claimant suffered a scheduled injury to his right foot and ankle as a result of the injury on November 4, 1991 and, therefore, claimant is entitled to a twenty percent (20%) functional impairment per the rating of Dr. Sloo.

The Appeals Board further finds as claimant's injury on November 4, 1991, is limited to a scheduled injury under K.S.A. 44-510d the issue of work disability under K.S.A. 44-510c is rendered moot.

Respondent further contends entitlement to reimbursement from the Kansas Workers Compensation Fund for overpayment of temporary total disability compensation. Claimant was entitled to 32 weeks temporary total disability compensation subsequent to the fall. He was awarded an additional 6.29 weeks temporary total disability compensation while involved in vocational rehabilitation subsequent to the injury. This would entitle claimant to a total of 38.29 weeks temporary total disability compensation. Claimant was paid 89 weeks temporary total disability compensation during the pendency of this matter indicating an overpayment of 50.71 weeks temporary total disability compensation. K.S.A. 44-534a(b) states:

"If compensation in the form of medical benefits, temporary total disability benefits or vocational rehabilitation benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to a preliminary award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund . . . for all amounts of compensation so paid which are in excess of compensation the employee is entitled to as determined in the full hearing on the claim."

The Appeals Board finds, as there was an overpayment of 50.71 weeks temporary total disability compensation, respondent and its insurance carrier would be entitled to a credit for any amounts paid as compensation against the Award. See K.S.A. 44-525(b). Any amounts paid in excess of the total Award by the respondent shall be reimbursed to the respondent by the Kansas Workers Compensation Fund.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated July 1, 1994, shall be and is herein modified. An Award of compensation is entered in favor of claimant, Lloyd N. Fehr, and against the respondent, Farmers Cooperative Union, and its insurance carrier, Farmland Mutual Insurance Company, in Docket No. 179,585 for an injury suffered on November 4, 1991, for a 20% permanent partial disability to the right lower extremity. Based upon the stipulated average weekly wage of \$391.93 and including a 15 week healing period pursuant to K.S.A. 44-510d(b), claimant is entitled to 38.29 weeks temporary total disability compensation at the rate of \$262.48 per week totaling \$10,050.36, followed thereafter by 33.14 weeks permanent partial disability at the rate of \$262.48 per week, totaling \$8,698.59 for a total award of \$18,748.95.

As of August 23, 1995, the entire amount is due and owing minus any amounts previously paid.

Respondent is entitled to reimbursement from the Kansas Workers Compensation Fund for any amounts paid claimant in excess of the total award of \$18,748.95.

Claimant is awarded medical expenses and unauthorized medical expenses per the Award of the Administrative Law Judge. Future medical shall be considered upon proper application to and approval by the Director.

Claimant's contract for attorney's fees is found reasonable and said fees are awarded insofar as they are not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and insurance carrier to be paid as follows:

Owens, Brake & Associates	
Deposition of Dr. Milo Sloo	\$165.85
Dated February 7, 1994	
Deposition of Stephen Burd	\$177.00
Dated February 7, 1994	
Regular Hearing Transcript	\$232.90
Dated February 9, 1994	
Deposition of Brian Beisner	\$140.00
Dated April 11, 1994	
Total	\$715.75
Jay Suddreth & Associates	
Deposition of Michael Dreiling	\$170.80
Dated March 14, 1994	

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mickey W. Mosier, Salina, Kansas  
Jeffrey E. King, Salina, Kansas  
George R. Robertson, Administrative Law Judge  
Philip S. Harness, Director